

highly probable, as plaintiff's counsel argues, that the defendant Sharon Steel Corporation assisted Sharon Railway Supply Company, Inc., in getting the much discussed order of 1935 for tie irons from the Pennsylvania Railroad, it does not follow, as plaintiff contends, that the defendant Sharon Steel Corporation had knowledge of the alleged infringement subsequently admitted by Sharon Railway Supply Company, Inc., or of the agreement wherein it admitted the same. At the time of the solicitation of the business of the Pennsylvania Railroad Company in 1935 the defendant Sharon Steel Corporation was the main creditor of Sharon Railway Supply Company, Inc., for steel furnished by the defendant. It would be but natural that the defendant Sharon Steel Corporation would assist its debtor in securing any business that it possibly could in order to hasten the debtor's payment of its account to the defendant. This does not reasonably justify plaintiff's implication of a well concocted plan by the defendant Sharon Steel Company to use Sharon Railway Supply Company, Inc., as its agent or tool to infringe the plaintiff's patent. Other inferences similarly drawn by plaintiff's counsel in support of the allegations of count 2 are likewise without foundation in my opinion.

Accordingly, I find the issues, under count 2 of the complaint, for the defendant.

With reference to Part II, I have carefully read the briefs in support of and in opposition to the defendant's motion for summary judgment on counts 3, 4 and 5, as well as the authorities therein cited.

494 Although I would not have entertained such a motion on the pleadings alone, the state of the record at the present time seems to warrant this motion. The plaintiff has taken numerous depositions pertaining to this part of the case. Certain evidence offered by the plaintiff at the trial of Part I also sheds light upon the situation confronting the Court in this motion with reference to Part II. Considering this evidence and the facts presented by the depositions on file, it is apparent that the plaintiff has no possibility of establishing the case he pleads in counts 3, 4 and 5 of his amended complaint.

Accordingly the defendant's motion with reference to these counts will be granted and said counts will be dismissed.

Counsel for the defendants may prepare and file with the Court, in writing, within twenty days from the date

hereof, proposed findings of fact, conclusions of law, and a draft of a proposed decree, consistent with the views herein expressed, delivering copies thereof to counsel for the plaintiff. Within ten days of the receipt of such copies counsel for the plaintiff may prepare and file with the Court, in writing, his observations with reference thereto and suggestions for the modification thereof, delivering a copy of such observations and suggestions to counsel for the defendants. Within five days thereafter counsel for the defendants may present to the Court, in writing, his reply to such observations and suggestions. Whereupon, the matter of making findings of fact, conclusions of law and a decree herein will be taken by the Court without further argument.

Campbell,
Judge.

January 28, 1943.

495 And afterwards on the 10th day of March, 1943, being one of the days of the regular March term of said court, in the record proceedings thereof, in said entitled cause, before the Honorable William J. Campbell, District Judge, appears the following entry:

Filed
Mar. 10,
1943.

IN THE DISTRICT COURT OF THE UNITED STATES.

* * (Caption—2584) * *

FINDINGS OF FACT AND CONCLUSIONS OF LAW.

Pursuant to the provisions of Rule 52 of the Federal Rules of Civil Procedure, the Court makes the following Findings of Fact and Conclusions of Law as part of the record herein.

Findings of Fact.

1. Plaintiff, Raymond E. Beegle, called "Beegle", of East St. Louis, Illinois, is the owner of the Beegle Patent No. 1,737,908 granted December 3, 1929 for Timber Anchor; defendant, Charles M. Thomson, as Trustee for Chicago & North Western Railway Company, called "Thomson", has a regular and established place of business at Chicago, Illinois; and defendant Sharon Steel Corporation, called "Sharon Steel", is a Pennsylvania

corporation, located and having its office and principal place of business at Sharon, Pennsylvania. Defendant

Sharon Steel appeared generally.

496 2. Beegle in his Complaint as originally filed and as first amended charged Thomson, as the used of "Sharon Special" irons, and Sharon Steel, as the manufacturer and seller of said irons, with infringement of the Beegle patent, by such use, manufacture and sale, and Beegle later declared only on claims 1, 2, 3 and 4 thereof, and Sharon Steel at the trial openly and avowedly assumed the defense of the patent infringement charge against Thomson.

2a. Beegle also declared upon claim 7 of the patent in suit but withdrew this claim at the trial.

3. Beegle amended his Complaint several times to include (in addition to Count I charging patent infringement) Counts II, III, IV and V charging Sharon Steel, but not Thomson, in such various counts with—

(Count II) Breach of a Settlement Agreement between Beegle and Sharon Railway Supply Company, called "Supply Company", dated July 6, 1935 effecting a settlement of an asserted infringement of Beegle's patent by the Supply Company.

(Count III) Unfair competition on several alleged grounds.

(Count IV) Coercing the Pennsylvania Railroad into purchasing Sharon's irons without open bidding, in violation of the second paragraph of 15 U. S. C. Section 20.

(Count V) Unlawful monopolization of the tie iron business in violation of the Anti-Trust Laws.

497 4. Numerous pleadings were filed, including Interrogatories and Answers thereto, and Beegle took a number of depositions in various parts of the country with respect to all of the five counts. Whereupon a pre-trial conference was held December 5, 1941, and by agreement of parties, upon suggestion and order of the Court, it was stipulated that this cause should be separated into two parts, Part 1 to consist of Counts I and II, and Part 2 to consist of Counts III, IV and V. Part 1 was tried on December 8, 9, 10 and 11, 1941. A second pre-trial conference with respect to Part 2 was held on December 29, 1941 and Sharon Steel under Rules 12(c), 56(b) and 56(c) of the Rules of Civil Procedure thereupon filed a Motion for Summary Judgment, upon the pleadings (including Interrogatories and Answers thereto), depositions,

testimony at the trial of Part 1, and admissions on file. Exhaustive briefs were filed by the parties on the counts tried and on the Motion for Summary Judgment. The Court entered a Memorandum Opinion on January 28, 1943.

Part One.

Count I.

5. The Beegle patent in suit discloses a timber anchor formed of flat material, and having a straight body portion, side arms and inwardly directed, angulate or hook-like terminals, and claims 1, 2, 3 and 4 are directed to this structure. Such terminals are illustrated and described in the patent as "comprising a primary terminal member *c* and a secondary terminal member *d*", and as being "hook-like" or "L-shaped". The inwardly directed terminals are constructed to readily interlock with like terminals on similar irons.

498 (5a) Plaintiff's patent clearly teaches a construction of tie iron having as its principal feature inwardly directed terminals constructed to readily interlock with like terminals on similar irons. In fact, this terminal development and facility of re-shaping are the principal improvements of Mr. Beegle over the older type of tie irons that he used when he was engaged as a driver of tie irons in the yards of the T. J. Moss Tie Company.

(5b) This teaching (mentioned in Finding 5a) is not followed in the defendants' accused irons.

6. The improvement in the Beegle patent is limited to the straight body portion and the inwardly directed terminals, by the patent disclosure itself, by the state of the art, and by the admissions, representations and amendments made by Beegle during the Patent Office proceedings.

7. The accused "Sharon Special" iron is formed from a crinkled strip and has no straight body portion as disclosed by Beegle and no anchor terminals comparable to those disclosed by Beegle, the Sharon iron being uniformly crinkled throughout. In the Beegle iron the particular anchor terminals afford the holding power, whereas in the accused "Sharon Special" iron the holding power is distributed substantially uniformly throughout by the crinkles formed throughout the iron. The two irons are different in structure and different in principle and operation.

499 8. During the prosecution of the Beegle patent, the claims in suit were so repeatedly amended and limited in view of the prior art as to estop Beegle from now asserting that they are of such broad scope as to embrace the accused "Sharon Special" iron.

9. The accused "Sharon Special" iron is fully justified by the prior art which discloses irons formed of crinkled metal, and of the same general shape and character as the accused iron. Such prior art includes the following patents which show operable structures: Sayre 180,070, Starr 366,269, Starr 396,900, Berry 412,696, Starr 419,375, Stambach 725,375, Williams 1,201,008, Williams 1,208,255, Fiebig 1,436,584.

10. In view of the above prior art, if the claims of the Beegle patent in suit are construed to be infringed by the accused "Sharon Special" iron then said claims are invalid for anticipation and lack of invention.

11. Sharon Steel pleaded laches by reason of certain alleged facts, but the Court makes no finding with respect to the same.

Count II.

12. The Settlement Agreement, Plaintiff's Exhibit 1, was entered into on July 6, 1935 between Beegle and the Supply Company, under which the Supply Company agreed not to infringe the patent in suit and acknowledged validity thereof. Sharon Steel acquired the assets of the Supply Company on November 16, 1936 (Bill of Sale, 500 Defendant's Exhibit B) and the officers of Sharon Steel had no knowledge of said Agreement prior to October, 1939. Sharon Steel in no way was a party to or participated in the negotiations for or the consummation of said Agreement. Sharon Steel has not made or sold any irons at any time like that which was the subject matter of the Settlement Agreement.

13. The officers of Sharon Steel had no knowledge of alleged infringement of the patent in suit by the Supply Company when that company solicited and obtained an order from the Pennsylvania Railroad Company in February, 1935, and the officers of Sharon Steel had no knowledge of said infringement at the time Sharon Steel purchased the assets of the Supply Company on November 16, 1936.

(13a) It is highly probable that Sharon Steel assisted

Supply Company in getting the order of 1935 for tie irons from the Pennsylvania Railroad, but Sharon Steel had no knowledge of the alleged infringement subsequently admitted by the Supply Company, or of the agreement wherein it admitted the same.

14. Sharon Steel purchased only the assets of the Supply Company and did not purchase any of the liabilities of that company. Sharon Steel did not acquire any of the stock or other securities of the Supply Company. There was no merger of the two companies *de facto* or otherwise. The Supply Company was dissolved by action of its stockholders immediately after the sale of the assets. At no time was Sharon Steel an agent of the Supply Company. There was no plan, well concocted or otherwise, by Sharon Steel to use the Supply Company as its agent or tool to infringe Beegle's patent.

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Part Two.

15. Sharon Steel in its Motion for Summary Judgment sought dismissal as to each of the counts of Part 2 on the ground of lack of jurisdiction, but the Court makes no finding as to that matter.

16. The pleadings, answers to interrogatories, depositions taken on behalf of Beegle, certain evidence offered at the trial of Counts I and II, and admissions of Beegle, show that Beegle has no possibility of establishing any one of the causes of action pleaded in Counts III, IV and V of the Amended Bill of Complaint, and there is no genuine issue as to any material fact.

Count III.

17. The use of the words "Sharon Special" did not create the impression, or induce purchasers of such irons to believe that Sharon Steel had developed what Beegle calls the "Beegle type of iron."

18. Sharon Steel never made, sold, offered for sale, or delivered any plain "Sharon Special" irons. Beegle himself admitted at the trial that he was familiar with the Sharon Steel irons and had never known of a plain "Sharon Special" iron.

19. Sharon Steel has not sold the so-called "Beegle type of iron" to any customers. It follows that Sharon Steel has not closely or otherwise adhered to any policy

of selling "Beegle type of irons" only to former customers of Beegle while selling to all other customers only "C" and "S" irons as alleged by Beegle. Sharon Steel has not represented to customers that the "C" and "S" 502 irons are preferable. Sharon Steel has not represented that it stands ready to deliver "Beegle type irons" under the name of "Sharon Special", plain or crinkled. Sharon Steel manufactures and sells the "C", "S" and "Sharon Special" irons in substantially equal quantities and sells its customers any of the three Sharon irons the customers want. The railroads buy the type of irons which are approved or recommended by their engineering or forestry departments after extensive tests. Sharon Steel has in no way impaired Beegle's ability to obtain new customers by reason of Sharon Steel's acts.

20. The marking of "Sharon Special" irons with notice of the Lloyd Patent No. 2,035,817 by Sharon Steel, is required by Sharon Steel's license from Mrs. Shaughnessy, Lloyd's widow, under said patent, is not improper, and has not induced customers to purchase the "Sharon Special" iron.

21. Sharon Steel did not interfere, maliciously or otherwise, with any contractual relations between Beegle and the Supply Company; and did not in any way circumvent the Settlement Agreement, Plaintiff's Exhibit 1, and Findings under Count II above also apply to the allegations of paragraph 14(e) of the Amended Complaint.

22. Sharon Steel has not used freight tonnage shipped over railroads as a means of selling anti-splitting irons. Its sales of irons are based upon the merits of the irons and upon tests and recommendations of the railroad engineers.

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Count IV.

23. Sharon Steel did not use its alleged large tonnage of freight as a club or otherwise to coerce purchases of anti-splitting irons from itself, and has not compelled the Pennsylvania Railroad Company to purchase irons exclusively from Sharon Steel without open bidding on each order. Paragraph 16 of the Amended Complaint does not charge that there was any interlocking directorate between Sharon Steel and the Pennsylvania Railroad, and Beegle's counsel in "Plaintiff's Brief Resisting Defendant's Motion for Summary Judgment" specifically conceded "plaintiff's

counsel admits that to date he has not established such a relationship * * *". The Court find again that the Pennsylvania Railroad as well as other railroads purchased Sharon Steel irons on the basis of tests and recommendations of their engineering departments.

Count V.

24. Sharon Steel asserts that the charges of Count V are barred by the Statute of Limitations of the State of Illinois, but the Court makes no finding on this matter.

25. Sharon Steel was not in competition with the Supply Company prior to the Fall of 1936 or at any other time. Findings under Count II also apply to Count V.

26. Sharon Steel has not attempted to monopolize and has not gone a great way toward actually or otherwise monopolizing the anti-splitting iron business of the United States. Beegle himself admitted at the trial, and his
504 counsel at one of the pretrial conferences asserted that Sharon Steel had at least five tie iron competitors.

Conclusions of Law.

1. Neither of the defendants has infringed upon claims 1, 2, 3 and 4 of the Beegle patent in suit or any of them.

2. If the said claims are of such scope as to embrace the accused iron, said claims are invalid in view of the prior art.

3. Sharon Steel was not and is not bound in any manner by the Settlement Agreement between Beegle and the Supply Company.

4. Sharon Steel has not been guilty of unfair competition nor violation of the Anti-Trust laws, as charged in Counts II, IV and V or any of them.

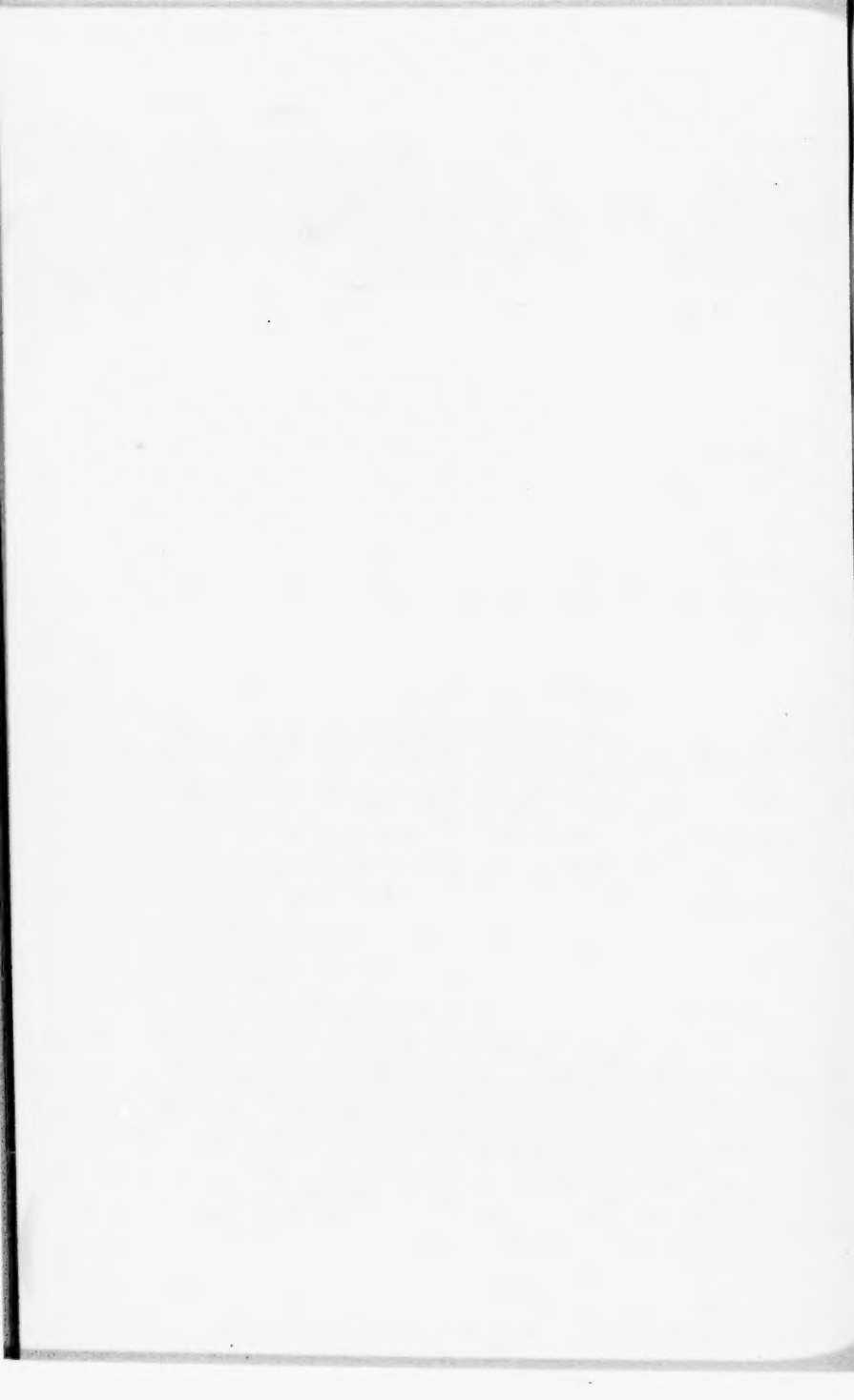
5. Counts II, III, IV, and V or any of them do not recite a valid cause of action against Sharon Steel.

6. A final judgment should be entered dismissing the Amended Complaint for want of equity with costs to defendants.

Enter:

Campbell,
District Judge.

March 10, 1943.



And afterwards, to-wit: On the sixth day of November, 1943, there was filed in the office of the Clerk of this Court, the Opinion of the Court which said Opinion is in the words and figures following, to-wit:

IN THE UNITED STATES CIRCUIT COURT OF APPEALS

For the Seventh Circuit.

No. 8334.

October Term, October Session, 1943.

RAYMOND E. BEEGLE, doing business as
BEEGLE TIE SERVICE COMPANY,

Plaintiff-Appellant,
vs.

CHARLES M. THOMSON, as trustee for
CHICAGO & NORTH WESTERN RAIL-
WAY COMPANY, and SHARON STEEL
CORPORATION,

Defendants-Appellees.

} Appeal from the District
Court of the United
States for the Northern
District of Illinois, East-
ern Division.

November 6, 1943.

Before MAJOR, KERNER, *Circuit Judges*, and LINDLEY,
District Judge.

LINDLEY, *District Judge*. Plaintiff questions the propriety of a judgment two-fold in character. Its complaint consisted of five counts, the first of which charged that Sharon Steel Company, as manufacturer and vendor, and Thomson, trustee for the Chicago & Northwestern Ry. Company, as user, had infringed Claims 1, 2, 3 and 4 of patent to Beegle, 1,737,908 covering a timber anchor iron, designed to prevent or retard splitting and checking of the timber in which it is placed. The other counts charged only the Steel Company; the second averring breach of an assumed contract not to infringe; the third, unfair competition; the fourth and fifth, injury to plaintiff arising from defendant's alleged violation of the Anti-Trust Act (15 U. S. C., Sections 2, 18 and 20).

A trial of the first two counts upon the merits resulted in the court finding, as to the first, non-infringement of the claims sued on and, if they be infringed, invalidity; and as to the second, failure of proof upon plaintiff's part. After a pre-trial conference as to the issues arising on Counts 3, 4 and 5, the court granted defendant's motion for summary judgment thereon and dismissed the complaint. Plaintiff now asserts that the court erred in each of the findings and in the entry of judgment.

From 1923 to 1928, Beegle was a workman engaged in driving tie irons into the ends of railroad ties, piled in stacks, awaiting seasoning and subsequent use in railroad tracks. Green ties tend, as they season, to dry near the perimeter first and in this process frequently check and split. Tie irons are driven into the ends to control or retard this action and are utilized also, after ties are in place in road beds, to prevent further rupture. The problem of counteracting these tendencies and preventing resulting deficiencies is concerned with phenomena occurring in heavy pieces of timber in the course of seasoning, stresses arising in their interior structures during that period, the various natural characteristics and tendencies of differently cut ties, (some being squared quarters or less portions of logs and some entire squared logs, depending upon the dimensions of the raw timber), and their action and performance under heavy train burdens and when subjected to the impact of large spikes driven into them to fix the rails. Railroad and equipment industries have, in the course of years, developed and utilized many varieties of irons, those finally employed being mostly in the shape of an S or a C and consisting of comparatively thin strips of steel with one edge beveled so as to be driven relatively easily into the ends of ties.

Beegle, working as a practical artisan, claims to have observed various deficiencies in the irons in prevailing use, namely, (1), an S or C iron does not prevent damage if a split passes across one of the curved parts of the iron, for that part tends to sever a portion of the tie,—the very thing it is intended to prevent; (2), curved ends of such an iron do not provide as efficient anchorage as irons of comparatively straight lines with triangular arms and right angled terminals, forming L-hooks, though the latter use less steel and, therefore, cost less; (3), S and C irons can not be reshaped by the workman, as is sometimes desirable in practice; and, (4), frequently they do not extend over

or span the lines down which a split may result from driving a spike in the rail.

Convinced of these deficiencies, as he says, he devised an iron of the preferred design mentioned in 2 above, and procured a patent thereon. In his application he said that his invention related to "improvements in timber anchors," and especially to anchors "adapted to prevent checking and splitting of railway ties * * * with a view to preventing spike splitting, vertical checking and season checks usually existing in cross-ties and other timbers." Obviously he did not limit his device to one adapted to be used on ties, but claimed it for anchorage or tying functions in any or all timber. Claim 1, typical, is as follows: "A timber anchor having substantially the outline of an open-side polygon, one side of which constitutes a substantially straight body portion, an anchor face at each end thereof, constituting adjacent sides of the polygon, and each carrying a relatively short, inwardly directed terminal; said faces being shorter than said body portion and projecting therefrom at an obtuse angle, the body portion, faces and terminals of said anchor being adapted in use, to coact to define and clamp an unbroken unit of timber. By his prescribed construction, he built on his iron, terminals "substantially L-shaped," teaching that thereby "the holding power * * * is increased greatly out of proportion to the amount of metal added to form this additional terminal member." In each claim he included this essential element, describing it in Claim 2 thus: "Each arm carrying an inwardly directed angular member, constituting the terminals of said anchor." Each of his illustrative figures shows this angular hook-like terminal.

Various patented timber anchor or tying devices appear in the prior art: Starr, 547,093, made one of crinkled sheet metal, the rounded angular curves serving to prevent two joining members from separating. Similar were the structures of Walker, 300,536 and Rasner, 515,168. Williams, 1,201,008 and 1,208,255 suggested irons with outwardly and inwardly extending projections, which tended to prevent joined materials from pulling apart. Fiebig, 1,436,584, described a straight line angular tying iron, lacking, however, the L-terminals of Beegle. Sayre, 180,070, taught the use of a similar, straight line, angular tying iron for wood, such as the corners of a picture frame, but he, too,

failed to add Beegle's L-terminal members. Other prior art workers made various pertinent suggestions.

It is apparent, therefore, that Beegle was no pioneer and, by broadly asserting an invention of an anchor device, he traveled beyond railroad tie irons into the field of similar tying devices for reinforcing joints or preventing rupture of other timber and charged himself with all he could perceive there. His claims were allowed only after amendment to show the "angular" terminal, or an "angulate member at the end of each face" or "an inwardly directed primary terminal at an extremity of said anchor." Evidently only because of the inclusion of this specified element, did the patent office impute invention to him. In view of the status of the art, Beegle's improvement was narrow in scope, indeed, and his claims must be limited to the precise thing he claimed. *Exhibit Supply Co. v. Ace Patents Corp.*, 315 U. S. 126; *Barrel Fitting & Seal Corp. v. Am. Flange & Mfg. Co.*, 74 Fed. (2d) 569 (CCA7).

Did defendants infringe? Beegle's teaching, as disclosed by his description and specification of terminals formed in right angles or near right angles, provided an improved anchor, resisting the withdrawing force of the timber, not found in other devices. His underlying thought was that the anchor arms and members, when formed in such angles, provided a tying, holding power necessary to overcome the tendency of timber to pull apart. Defendants' device includes no tying members or terminals of right angle form. It is made entirely of crinkled sheet metal and the thought underlying its construction is that the crinkles, creases or waves of the metal will furnish efficient anchorage power to overcome the tendency of the timber to spread. The only angular members are the two arms which form angles with the main body. These lack the L-hooked terminals. It seems to us that the two conceptions are far apart in their proposed solutions of the problem. Beegle, if he achieved invention over the prior art, did so because of the exact form which he specified. Consequently, his claims must be limited to that specified construction. On the other hand, defendants more clearly adhere to the prior art and avoid the very elements which, it seems to us, led to Beegle's grant. We think the District Court correctly held that they have not infringed. We think that the patented device and the one accused are far from being identical or equivalent to each

other, in structure, design, operation or principle. Rather they represent different approaches to and different methods of solution of the problem confronting the railroad tie-iron art.

As to Count 2, admitting for the purpose of this disposition, that defendant Steel Company is bound by the contract, agreeing "to observe and respect" the patent and not infringe it, defendant still has a right to show that it has not broken that contract, by demonstrating that nothing it has done constitutes infringement and that what it has produced is not that, or the equivalent of that which it has recognized as valid. We think the correct principles here are those controlling where a patentee has licensed another to make the patented device, concerning which, in *Sinko Tool & Mfg. Co. v. Casco Products Corporation*, 89 Fed. (2d) 916, 917, we said that "the license raises no estoppel against the licensee in respect to the noninclusive type of his product. * * * It does not estop him in any way from making devices which are not within the class licensed, for as to such products the licensee takes nothing by the license, no immunity from suit and assumes no obligation respecting same." *International Burr Corp. v. Wood Grinding Service*, 34 Fed. (2d) 905. Inasmuch as defendant's device did not infringe, there is no breach of contract. Defendant never agreed to refrain from manufacturing noninfringing devices.

Count 3 in Paragraphs 14 (a), (b) (c) and (d), charges defendant with unfair competition. An essential premise for the liability sought to be enforced in this count is plaintiff's averment that defendant has offered for sale and sold a type of iron of the same general outline as plaintiff's and "an unquestionable infringement of plaintiff's patent" and, in doing so, has, in various manners, been guilty of unfair competition. If this essential averment, upon which all other parts of the pleading rest in order to bring about liability, were eliminated, nothing would remain stating in any wise any cause of action against defendant. The court had tried the question of infringement and the trial had resulted in a finding that defendant did not infringe. The device which defendant sold was, as the court found and as we agree, not a "Beegle type" iron, as averred, not of the same general appearance as Beegle's iron and not an infringement of Beegle's patent. It was, as we have pointed out, rather a development of the prior art, more

nearly following its teaching than that of Beegle, whose invention, we have seen, must be given the narrow scope of his actual specification. With this essential averment decided upon the merits against plaintiff, there remains nothing in these paragraphs to create a liability.

In Paragraph 14 (e) of Count 3, plaintiff charges that defendant "maliciously interfered" with the contractual relationship between plaintiff and Sharon Supply Company. This conclusion is based ultimately upon averments of fact, one essential element of which is that the Supply Company was infringing and that the Steel Company knew this and took over the assets and liabilities of the Supply Company in order to circumvent a covenant of the latter not to infringe. But to create liability upon this hypothesis, it was necessary for plaintiff to aver and prove further that the circumvention was successfully achieved,—in other words, that the Steel Company did in fact proceed to infringe. But the proof in this respect failed. Hence plaintiff could take nothing by virtue of this paragraph.

Furthermore the court found as a fact in the trial of Count 2, where the same issue was presented, that the Steel Company had no knowledge of any alleged infringement by the Supply Company and did not assume any of the liabilities of the latter. An examination of the evidence is convincing that it amply sustains the finding. It follows that the court had before it nothing to support a finding for plaintiff on this paragraph.

Paragraph 14 (f) of Count 3 avers that the Steel Company is "using the amount of tonnage which it ships on the railroads as a means of selling anti-splitting irons" and thereby has achieved commercial success. This is said to be unfair competition, yet absent are all averments that anything defendant did was of unlawful character or of facts constituting wrongful action upon defendant's part. If plaintiff hoped to succeed, it behooved it to state sufficient facts to constitute a valid cause of action. This it failed to do.

In Count 4 plaintiff charges violation of the Anti-Trust Act (15 U. S. C., Section 20, Par. 15), averring specifically that defendant "by using its large volume of freight haul as a club to coerce purchases of anti-splitting irons from itself, in an amount in excess of \$50,000.00 a year, has compelled the Pennsylvania Railroad to purchase irons exclusively from the defendant, * * * without open bidding

on each other” and that thereby plaintiff has been deprived from receiving the business of the Pennsylvania Railroad Company. Under Section 20 * Congress forbids a railroad from purchasing, without open bidding, maintenance goods of a value in excess of \$50,000 from any corporation having upon its Board of Directors or as an officer, manager or agent, any person who is at the same time a similar director, manager, officer, or agent of the railroad company. The statute creates no liability unless such an interlocking director or agency relationship exists. Inasmuch as plaintiff made no averment of such relationship, the count was deficient as a statement of a cause of action and the court properly entered judgment thereon in favor of defendant.

Plaintiff urges that the second paragraph of Section 20, which fixes criminal responsibility for violation of the Act, creates also a cause of action, if open bidding is prevented, irrespective of whether an interlocking relationship exists. We think this construction unjustified. Statutory remedial causes of action must find express basis in congressional act; they do not arise by implication from a provision for a criminal penalty.

In Count 5 plaintiff charged defendant with violation of Sections 15 and 18, Title 15 U. S. C. in that, prior to the fall of 1936, defendant was in competition with Sharon Railway Supply Company in the sale of anti-splitting irons; that it then acquired all the stock of the Supply Company and dissolved that corporation, so that competition was lessened and even eliminated, whereby plaintiff “is given a cause of action.” By amendment plaintiff averred, in

* SECTION 20: No common carrier engaged in commerce shall have any dealings in securities, supplies, or other articles of commerce, or shall make or have any contracts for construction or maintenance of any kind, to the amount of more than \$50,000, in the aggregate, in any one year, with another corporation, firm, partnership, or association when the said common carrier shall have upon its Board of Directors or as its president, manager, or as its purchasing or selling officer, or agent in the particular transaction, any person who is at the same time a director, manager or purchasing or selling officer of, or who has any substantial interest in, such other corporation, firm, partnership, or association, unless and except such purchases shall be made from, or such dealings shall be with, the bidder whose bid is the most favorable to such common carrier, to be ascertained by competitive bidding under regulations to be prescribed by rule or otherwise by the Interstate Commerce Commission. No bid shall be received unless the name and address of the bidder or the names and addresses of the officers, directors and general managers thereof, if the bidder be a corporation, or of the members, if it be a partnership or firm, be given with the bid.”

addition, that plaintiff "is attempting to monopolize and" has done a great deal toward monopolizing the anti-splitting iron business of the United States. The court found, not only as to this count but upon the merits as to Count 2, where the issue was squarely presented, that the relationship between the Steel Company and the Supply Company was not that of competitors; that the evidence established, beyond peradventure, that there was in fact no competition between the Steel Company and the Supply Company; that defendant manufactured no tie irons prior to the purchase of the Supply Company and that, eventually, the Steel Company purchased from the Supply Company its assets but assumed none of its liabilities, with a resulting loss of capital investment to the stockholders of the Supply Company, which was then in failing condition. The evidence before the court, produced by the plaintiff itself, could reasonably lead to no other finding and the court properly, therefore, rather than enter into a long extended trial where plaintiff would be unable to prove one of its essential averments, entered summary judgment. *Abouaf v. Spreckels*, 26 Fed. Supp. 830.

Furthermore, as we pointed out in *American Press v. U. S.*, 245 Fed. 91 (CCA7), a firm closing out its business because of financial difficulties may sell its plant even to a competitor without violating the Anti-Trust Law. See also *International Shoe Co. v. Federal Trade Commission*, 280 U. S. 291.

However, the District Court need not have proceeded so far in justification of its action in dismissing this count. Section 15, allowing private parties treble damages for injury accruing to their business from violation of the Anti-Trust Act, embraces, as one of the essentials to such action, injury to plaintiff's business. The complaint must affirmatively show this injury. It is not enough to allege something forbidden and claim damages resulting therefrom. Allegation of the specific injury suffered by plaintiff differing from that sustained by it as a member of the community is essential. The manner, nature, character and extent of the injury sustained and the facts from which injury accrues and upon which damages may be assessed as well as those with regard to the effect of the alleged violation upon plaintiff's business, must be pleaded. The mere existence of a violation is not sufficient *ipso facto* to support the action, for no party may properly seek to

secure something from another without allegation and proof of facts demonstrating pecuniary loss springing from or consequent upon the unlawful act. *American Banana Co. v. United Fruit Co.*, 213 U. S. 347; *Keogh v. Chicago, etc., R. Co.*, 271 Fed. 444 (CCA7), aff 260 U S. 156; *Jack v. Armour*, 291 Fed. 741 (CCA8); *Twin Ports Oil Co. v. Pure Oil Co.*, 119 Fed. (2d) 747, cert. denied 314 U. S. 644; *Westmoreland Asbestos Co. v. Johns-Manville Corp.*, 30 F. Supp. 289; 32 F. Supp. 731; *Locker v. American Tob. Co.*, 218 Fed. 447; *American etc. Co. v. O'Halloran*, 229 Fed. 77; *Leonard v. Socony-Vacuum Oil Co.*, 42 F. Supp. 369; *Louisiana Farmers' Protective Union v. Great Atlantic & Pacific Tea Co.*, 40 F. Supp. 897. Inasmuch as the count embraced no such essential averments the court properly entered judgment dismissing it.

Nor does the bill of particulars remedy this lack of averment, for it, too, is singularly lacking in recital of any facts sufficient to sustain an averment of injury to plaintiff's business.

The judgment is

AFFIRMED.

Endorsed: Filed November 6, 1943. Kenneth J. Carriek, Clerk.
